

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE: AMENDMENTS TO  
COURT OF CHANCERY RULE 3, RULE 5(g)(7), RULE 23, RULE  
23.1, and RULE 23.2

This 20<sup>th</sup> day of December, 2006, IT IS HEREBY ORDERED that Court of Chancery Rule 3(aa) shall be amended by adding the following language as the first sentence, effective January 1, 2007.

Rule 3(aa) *Verification*.

All complaints as defined in Rule 3(a) shall be verified.

IT IS FURTHER ORDERED that Court of Chancery Rule 5(g)(7) shall be amended by adding the following language as the second sentence, effective January 1, 2007.

Rule 5(g)(7)

In addition, 30 days after final judgment has been entered without any appeal having been taken therefrom, the Register in Chancery shall send a notice to any person who designated a document to be filed under seal that such document shall be released from confidential treatment, unless that person makes application

to the Court within 30 days for further confidential treatment for good cause shown.

IT IS FURTHER ORDERED that Court of Chancery Rules 23, 23.1, and 23.2 shall be amended, effective January 1, 2007, as follows:

**ORDER**

WHEREAS, the practice of this Court in class and corporate derivative litigation has been to decline to award any benefit to the class representative bringing suit, beyond the award to all members of the class or all shareholders, absent extraordinary circumstances; and

WHEREAS, the practice of this Court has been to award attorneys' fees in such cases with the understanding that the award was made solely to legal counsel for the class or shareholders, in compensation for legal services provided to the class or the shareholders and corporation; and

WHEREAS, it appears appropriate that this practice should be made clear by rule:

NOW, THEREFORE, this \_\_\_\_\_ day of December, 2006, IT IS HEREBY ORDERED that Court of Chancery Rule 23, Rule 23.1 and Rule 23.2 shall be amended as follows:

The attached amendments to Rules 23, 23.1 and 23.2 shall be effective on January 1, 2007 (the “effective date”). All the provisions of the amendments shall apply to all class or derivative actions pending on the effective date or filed after the effective date, except that with respect to class or derivative actions pending in the Court of Chancery on the effective date, new Section (aa) of Rule 23 and new Section (b) of Rule 23.1 apply in accordance with the following paragraph.

In each class and derivative action pending in the Court of Chancery on the effective date: (a) any person continuing as a representative party continuing to prosecute a previously filed motion to intervene as a representative party or continuing to prosecute a previously filed motion to be appointed as representative party shall file with the Register in Chancery the affidavit required by amended Rule 23 (aa) or amended Rule 23.1 (b), as applicable, within 90 days after the date of this order, unless such date is extended by the Court for cause shown; and (b) any person filing a new motion to intervene as a representative party or a new motion to be appointed as a representative party, after the effective date, shall file with the Register in Chancery the affidavit required by amended Rule 23 (aa) or amended Rule 23.1 (b) within the later of (i) the time provided in amended Rule 23 (aa) or amended Rule 23.1 (b), as applicable, or (ii) within 90 days after the date of this order, unless such date is extended by the Court for cause shown.

### **Rule 23.**

*Rule 23 is amended by adding Section (aa) immediately following Section (a).*

- (aa) Each person seeking to serve as a representative party on behalf of a class pursuant to this Rule shall file with the Register in Chancery an affidavit stating that the person has not received, been promised or offered and will not accept any form of compensation, directly or indirectly, for prosecuting or serving as a representative party in the class action in which the person or entity is a named party except for (i) such damages or other relief as the Court may award such person as a member of the class, (ii) such fees, costs or other payments as the Court expressly approves to be paid to or on behalf of such person, or (iii) reimbursement, paid by such person's attorneys, of actual and reasonable out-of-pocket expenditures incurred directly in connection with the prosecution of the action. The affidavit required by this subpart shall be filed within 10 days after the earliest of the affiant filing the complaint, filing a motion to intervene in the action or filing a motion seeking appointment as a representative party in the action. An affidavit provided pursuant to this subpart shall not be construed to be a waiver of the attorney-client privilege.

*Rule 23, Section (e) is amended by adding the following language to the end of the existing language.*

At the time that any party moves or otherwise applies to the Court for approval of a compromise of all or any part of a class action, each representative party in such action shall file with the Register in Chancery a further affidavit in the form required by section (aa) of this rule.

#### **Rule 23.1**

*The language in Rule 23.1 is deleted in its entirety and replaced with the following language.*

- (a) In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall allege that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law. The complaint shall also allege with particularity the

efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and the reasons for the plaintiff's failure to obtain the action or for not making the effort.

- (b) Each person seeking to serve as a representative plaintiff on behalf of a corporation or unincorporated association pursuant to this Rule shall file with the Register in Chancery an affidavit stating that the person has not received, been promised or offered and will not accept any form of compensation, directly or indirectly, for prosecuting or serving as a representative party in the derivative action in which the person or entity is a named party except (i) such fees, costs or other payments as the Court expressly approves to be paid to or on behalf of such person, or (ii) reimbursement, paid by such person's attorneys, of actual and reasonable out-of-pocket expenditures incurred directly in connection with the prosecution of the action. The affidavit required by this subpart shall be filed within 10 days after the earliest of the affiant filing the complaint, filing a motion to intervene in the action or filing a motion seeking appointment as

a representative party in the action. An affidavit provided pursuant to this subpart shall not be construed to be a waiver of the attorney-client privilege.

- (c) The action shall not be dismissed or compromised without the approval of the Court, and notice by mail, publication or otherwise of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the Court directs; except that if the dismissal is to be without prejudice or with prejudice to the plaintiff only, then such dismissal shall be ordered without notice thereof if there is a showing that no compensation in any form has passed directly or indirectly from any of the defendants to the plaintiff or plaintiff's attorney and that no promise to give any such compensation has been made. At the time that any party moves or otherwise applies to the Court for approval of a compromise of all or any part of a derivative action, each representative plaintiff in such action shall file with the Register in Chancery a further affidavit in the form required by subpart (b) of this rule.

- (d) For purposes of this Rule, an “unincorporated association” includes a statutory trust, business trust, limited liability company and a partnership (whether general or limited), and a “member” includes a person permitted by applicable law to bring a derivative action to enforce a right of such an unincorporated association.

### **Rule 23.2**

*Rule 23.2 is amended by adding the following language to the end of the existing language.*

For the purposes of this Rule, an “unincorporated association” includes a statutory trust, business trust, limited liability company and a partnership (whether general or limited), and a “member” includes a person permitted by applicable law to bring a derivative action to enforce a right of such an unincorporated association.

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*/s/ William B. Chandler III*  
William B. Chandler III



Respectfully advised:

/s/ Stephen P. Lamb  
Stephen P. Lamb

/s/ Leo E. Strine, Jr.  
Leo E. Strine, Jr.

/s/ John W. Noble  
John W. Noble

/s/ Donald F. Parsons, Jr.  
Donald F. Parsons, Jr.